IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-884

* * *

**TONY GARRETT,**

*Petitioner*

**V.**

**W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL,**

*Respondents*

* * *

**On Petition for Writ of Certiorari To the United States Court of Appeals For The Fifth Circuit**

* * *

## BRIEF FOR RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 556 F.2d 1274 (5th Cir. 1977). The opinion of the United States District Court for the Northern District of Texas is reported at 424 F.Supp.468 (N.D. Tex. 1977). Both opinions are appended to Petitioner's brief.

## JURISDICTION

It appears that Petitioner has timely filed and met this Court's formal jurisdictional requirements under 28 U.S.C. §1254(1). Respondent, however, denies that the criteria of Supreme Court Rule 19 governing the

exercise of this Court's discretionary review on writ of certiorari have been met.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The applicable constitutional provisions, statutes and rules are the First and Fourteenth Amendments to the United States Constitution; Articles 43.17 and 43.20 of the Texas Code of Criminal Procedure; and the Texas Department of Corrections Media Policy.

## QUESTIONS PRESENTED

Respondents cannot agree that this case involves the issues stated by Petitioner (Petition at 2). For example, Respondents have made no effort to deprive the public of knowledge of how executions are conducted. In fact, they have gone to great lengths to make news of the executions readily available. So, too, it is incorrect to say that greater access is extended to the print media than to the electronic media. Representatives of both may witness the execution, either in person or by closed circuit television, but neither may record it on film or tape.

With these reservations, Respondents believe that the issues should be stated as follows:

1. Whether a television cameraman has a constitutionally guaranteed right to film an execution for showing on television?

2. Whether a television cameraman is entitled to greater access to the execution chamber than that accorded the general public?

3. Whether it is unequal protection of the laws or a prior restraint to permit members of the news media to witness, but not to photograph or record, an execution?



## STATEMENT OF THE CASE

On December 13, 1976, Tony Garrett, a reporter-producer for television station KERA, Dallas, Texas, filed a complaint against W. J. Estelle, Jr., the Texas Board of Corrections, (TDC), and John Doe as an unknown executioner named by the Director of the Texas Department of Corrections. He sought to have Article 43.20 of the Texas Code of Criminal Procedure held unconstitutional as violative of his rights under the First and Fourteenth Amendments of the United States Constitution. Plaintiff further sought to enjoin Defendants from (1) denying him access to prisoners on death row for interviews and (2) denying him permission to report by audio and video means any execution to be carried out in the State of Texas.

Prior to filing any pleadings the Texas Attorney General's office appeared on behalf of the State of Texas and W. J. Estelle, Jr., at three hearings on December 17, 1976, December 21, 1976, and January 3, 1977, conducted by the District Court.

On January 5, 1977 the district judge in a preliminary injunction declared Article 43.17 of the Texas Code of Criminal Procedure unconstitutional in light of the First and Fourteenth Amendments and ordered that press visits to death row and AP-UPI press pool provisions be reinstituted according to the guidelines originally proposed by Texas. The district judge further ordered that Petitioner be allowed to witness and to film for rebroadcast to the public any execution, provided he agreed to act as a pool representative of the electronic media.

On February 11, 1977, Defendants moved to dismiss Petitioner's suit and to modify the district court's injunction by deleting the provision ordering the state to

allow him to witness and film executions. Accompanying the motions was Defendants' statement of intent to adhere to the guidelines that the district judge had ordered reinstituted and to seek amendment by the state legislature of Article 43.17 to permit interviews with death row inmates. Defendants also renewed the proposal to provide closed circuit television facilities for the press at large. The District Court denied both motions. Defendants appealed only that portion of the district judge's preliminary injunction requiring Texas to admit Petitioner to the execution chamber to film executions.

The United States Court of Appeals for the Fifth Circuit held that the district court erred in finding that the First Amendment requires Defendants to allow Petitioner to film Texas executions. The Court of Appeals also held that the Texas media policy barring the use of motion picture cameras to gather news at executions does not deny Petitioner equal protection of the law. Hence, the Court of Appeals reversed the judgment of the District Court requiring the State of Texas to permit Petitioner to film executions and dissolved that portion of the district court's preliminary injunction ordering such permission. The Court of Appeals held in short that the rule of law enunciated in *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) is applicable to the circumstances of the present case.

## ARGUMENT AND AUTHORITIES

### I.

### The Court of Appeals Correctly Held that *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) are Adversely Dispositive of Petitioner's Claim of Right to Enter Texas Execution Chambers and Film an Actual Execution.



As correctly stated by Petitioner in his petition at 17, "The basic holding of the Fifth Circuit opinion was that the press has no right of access to information not generally available to the public." That was also the holding of this court in *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). That holding forms the cornerstone of the position of the State of Texas that there is no constitutional right to film an execution and that the District Court had no authority to enter an order imposing upon the state the affirmative duty to permit Petitioner to be present in the execution chambers and to film the execution. Under a state statute, Art. 43.20, V.A.C.C.P., the constitutionality of which has been upheld by both the District Court and the Court of Appeals, members of the general public in Texas have no right to be present at executions. The state, therefore, may deny Petitioner access to the execution chamber for the purpose of filming the event.

Petitioner counters essentially with two claims:

(1) That he has a constitutional right to film this news event because he is the surrogate of the public and the public has a right to view it; and

(2) That to deny him access to the execution chamber to electronically report or record the execution is a denial of equal protection to the electronic media when other news persons are permitted to be present and further constitutes an unauthorized prior restraint of his First Amendment rights.

The state does not question the significance of free speech or freedom of the press or of assembly to the country's welfare. There is no suggestion that news

gathering does not qualify for First Amendment Protection. In *no* way has the state of Texas sought to limit what may be reported by any of the media, whether of the printed or electronic variety. The issue in this case is not whether the state may interfere with Petitioner's reportage of a news event, for no such interference is presented, but whether Petitioner has the constitutional right to take his own movie camera into the execution chamber.

The State of Texas in fact has gone far beyond what was constitutionally required by agreeing not only that two representatives of the press might be physically present in the execution chamber, but also that closed circuit television facilities would be provided for all other representatives of the news media to view the execution. The state has gone to great lengths to make it possible for representatives of the news media to gather the news. The State of Texas has only stated that no recording device, whether aural or visual, shall be permitted either in the execution chamber itself or in the area provided for the press to monitor the event on closed circuit television. This prohibition applies not only to Petitioner and his television camera but also, for example, to newspaper persons and their still cameras and to radio newspersons and their tape recorders. No serious equal protection question is presented.

Similarly, Petitioner's contention that the State of Texas has impermissibly restricted his "method of use" (Petition at 2) of any closed circuit telecast is utterly without merit. Petitioner, like the other news persons who may view the execution, will be free to disseminate any account he wishes of what he sees and hears. Because the state has attempted to exercise no restriction whatsoever upon the use or treatment of any information or data possessed by the media, no serious question of prior restraint is presented. *Cf. New York*



*Times v. Sullivan*, 376 U.S. 254 (1964).

Hence, the true issue in the instant case is, as stated above, whether the Constitution imposes an affirmative duty upon the State of Texas to give Petitioner a greater right of access than afforded members of the public. No tortuous semantic twisting by Petitioner can convert this issue to one of censorship, unequal protection or prior restraint.

Justice Harlan, in a concurring opinion in *Estes v. State of Texas*, 381 U.S. 532, 589 (1965) stated as follows:

> "The free speech and press guarantees of the First and Fourteenth Amendments are also asserted as embodying a positive right to televise trials, but the argument is greatly overdrawn. Unquestionably, television has become a very effective medium for transmitting news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit those are credible policy arguments in favor of television, they are not arguments of constitutional proportions. *The rights to print and speak, over television as elsewhere, do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries* into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. *But the line is drawn at the*

*courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public.*" (emphasis added).

That principle, we submit, is applicable here. The right to print and speak, over television or elsewhere, does not embody an independent right to bring the mechanical facilities of the broadcasting and newspaper industries into the death chamber. The line is drawn at the death chamber door and within that door a reporter's rights are no greater than those of any member of the public.

Since the Court of appeals has correctly decided the issues under applicable law, this Court should not assume jurisdiction.

II.

The Holding of the Fifth Circuit Court of Appeals is Not in Conflict with *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976), *cert. granted*, ___U.S.___, 97 S.Ct. 2630 (1977), or *Pacifica Foundation v. F.C.C.*, 566 F.2d 9 (D.C. Cir. 1977), *cert. granted*, ___U.S.L.W.___ (Jan. 9, 1978), both of Which Cases in any Event are Pending Review Before this Court.

Petitioner's assertion that the opinion of the Fifth Circuit herein conflicts with those of the Ninth Circuit Court of appeals in *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976), *cert. granted*, 97 S.Ct. 2630 (1977), and of the District of Columbia Circuit Court of Appeals in *Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (D.C. Cir. 1977 *cert. granted*, ___ U.S.L.W.___ (Jan. 9, 1978), is wholly without merit. In *KQED, supra*, the Court of Appeals held that the Constitution does not allow state



officials to restrict inmates' First Amendment rights by refusing them any access whatsoever to newspersons. In the instant case, Respondents have adopted an "open door" policy with respect to interviewing of prisoners on death row and have even arranged for newspersons to view actual executions. That the Ninth Circuit may have spoken overbroadly in its opinion can hardly suffice to create a conflict in the holding of that court with the Fifth Circuit's holding in the instant case.

In *Pacifica Foundation, supra*, the District of Columbia Court of Appeals struck down an Order of the Federal Communications Commission purporting to ban allegedly obscene language during certain hours of the radio broadcasting day because the Order was overbroad in light of both the Constitution and relevant federal statutes. A purported censorship case has little to do with a right of access case, like the instant one in which, so far as Respondents are concerned, the media are free to say and depict any matter whatsoever, including a simulated execution, upon the public airwaves. The instant case concerns not the content or substance of the media reportage but only the mechanical means of such reportage. Censorship is not involved.

In any event, this Court has granted petitions for writ of certiorari in both *KQED, supra*, and *Pacifica Foundation, supra*, on May 23, 1977, and January 9, 1978, respectively. It is obvious that the holdings and some of the dicta in the cited cases may be rendered wholly nugatory following consideration of the cases by this Court. Because the Fifth Circuit opinion is entirely correct, any allegation of conflict with the cited cases is at best premature and in all likelihood totally erroneous.

## CONCLUSION

For the reasons stated above, therefore, Respondents pray that the petition for writ of certiorari should be denied.

Respectfully submitted,

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## PROOF OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General and a member of the Bar of this Court, hereby certify that a copy of the above and foregoing Brief for Respondent in Opposition was placed in the United States Mail, certified, return receipt requested on this the _____ day of January, 1978, to the following address: Petitioner's attorneys, Peter A. Lesser, 2812 Fairmount, Dallas, Texas 75201; Mr. Fred Time, 600 Jackson Street, Dallas, Texas 75202 and Mr. Tom S. McCorkle, 522 Main Bank Building, Dallas, Texas 75202.

JOE B. DIBRELL, JR.